IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3665 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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RAJESHKUMAR DEVABHAI AHIR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3665 of 2001

MS SUBHADRA G PATEL for Petitioner No. 1

MR KT DAVE AGP for Respondent No. 1-3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 25/09/2001

ORAL JUDGEMENT

1. In exercise of powers conferred under Section 3 (2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 ('the Act' for short), District Magistrate, Banaskantha at Palanpur, vide order dated March 9, 2001, Annexure A to the petition, has detained the petitioner

detenu.

2. Averments made in the petition and the grounds of detention manifest that the detaining authority considered the petitioner as a bootlegger within the meaning of section 2 (b) of the Act as one case under the Prohibition Act is registered against him which is under investigation and statements of two witnesses are recorded. The detaining authority, therefore, considered the activities of the detenu as detrimental to the maintenance of public order and by claiming privilege under Section 9 (2) of the Act, by not disclosing the identity of the witnesses, passed the order of detention and detained the petitioner.

3. By filing this petition under Article 226 of the Constitution, the petitioner has assailed the order of detention on various grounds and prayed to issue a writ of habeas corpus or any other appropriate writ, order or direction quashing and setting aside the order of detention and prayed to set him at liberty forthwith.

4. The petitioner has challenged the order of detention on various grounds. Ms. Subhadraben Patel, learned advocate for the petitioner, has submitted that the representation dated March 21, 2001 forwarded by the detenu to the District Magistrate was received by him on March 23, 2001 but he did not send it to the State Government upto March 27, 2001 and therefore there is delay in sending the representation to the State Government which has seriously prejudiced the right of the petitioner - detenu. She further contended that the said representation was received by the State Government on April 4, 2001 but the State Government did not decide the representation upto April 7, 2001. She, therefore, contended that there is abnormal delay on the part of the detaining authority in sending the representation to the State Government and the said delay is not explained by the detaining authority and on this ground the order of detention is vitiated.

5. Ms. Patel, learned advocate for the petitioner, further contended that so far as statements of two witnesses recorded by the detaining authority for which privilege under Section 9 (2) of the Act is claimed is concerned, privilege claimed by the detaining authority cannot be considered as genuine in the absence of any reply affidavit and therefore on both these counts the order of detention is vitiated and the order of detention deserves to be quashed and set aside and the petition deserves to be allowed by setting the petitioner at

liberty forthwith.

6. Mr. K.T. Dave, learned AGP who appears for respondents has opposed the petition by raising several contentions. He however, does not dispute the factual aspects of delay on the part of the detaining authority in forwarding the representation to the State Government and considering the same by the State Government. He further contended that the detaining authority has rightly claimed privilege under Section 9 (2) of the Act by not disclosing identity of the witnesses as in the impugned order it is stated that the witnesses have expressed their fear if their identity is disclosed to the detenu. However, he urged to pass appropriate order in the light of the law laid down by the Supreme Court as well as this Court.

7. I have considered the submissions advanced by the learned advocates for the parties. I have perused the averments made in the petition and the documents annexed therewith as well as the impugned order of detention.

8. The petitioner is detained under the Act as a case under the Prohibition Act is registered against him and also on the ground that statements of two witnesses are recorded against him in an unregistered case for which the detaining authority has claimed privilege under Section 9 (2) of the Act. It is seen from the record of the case that the detenu has forwarded a representation on March 21, 2001 which was received by the detaining authority on March 23, 2001 and thereafter it was despatched to the State Government by the detaining authority on March 27, 2001 which was received by the State Government on April 4, 2001 and decided on April 7, 2001 and therefore there was delay at two stages. The detaining authority has kept the said representation with him for four days and the State Government has also not decided the said representation for a period of three days. Therefore, there is abnormal delay in sending the representation as well as deciding the same.

9. In this connection, it would be profitable to refer to the judgment of the Supreme Court in the case of Nawalshankar Ishwarlal Dave v. State of Gujarat, AIR 1994 SC 1496. In the said case the State Government kept the representation without being considered and disposed and awaited decision of Advisory Board. The Supreme Court has held that consideration and rejection of representation after receipt of Board's decision is illegal.

10. Similar view is expressed by the Supreme Court in Harish Pahwa v. State of UP, AIR 1981 SC 1126. Again in the case of Rajammal v. State of Tamil Nadu, AIR 1999 SC 684 the Supreme Court has held that on the ground of unexplained delay of five days in disposing the detenu's representation the order of detention is vitiated.

11. Similar question was considered by a Division Bench of this Court in Urmilaben Navnitlal Gandhi v. Commissioner of Police, 1994 (2) GLH (U.J.) 10 wherein the delay of five days in considering representation was not properly explained, therefore, this Court has held that the order of detention is invalid.

12. Applying the aforesaid principles laid down by the Supreme Court as well as this Court to the facts of the present case, in the instant case also there is a delay on the part of the detaining authority in forwarding the representation to the State Government. Besides this, there is delay on the part of the State Government in deciding the said representation. Therefore, the order of detention is vitiated.

13. So far as the statements of two witnesses recorded by the detaining authority for which privilege is claimed under Section 9 (2) of the Act, the privilege claimed by him cannot be called as genuine in absence of reply affidavit. Therefore, on this ground also the order of detention is vitiated.

14. On overall view of the matter, the order of detention deserves to be quashed and set aside and the petition deserves to be allowed.

15. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned order of detention passed against the petitioner - detenu is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith if not required in connection with any other case. Rule is made absolute. No order as to costs. Direct service is permitted.

(A. M. Kapadia, J.)

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